



U.S. Citizenship
and Immigration
Services

FILE:

Office: VERMONT SERVICE CENTER

Date: OCT 01 2004

IN RE:

Petitioner:
Beneficiary

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is described as "a Home for the Aged Poor operated by the Little Sisters of the Poor," a Roman Catholic organization. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a nursing assistant. The director determined that the petitioner had not established that the proffered position qualifies as a religious occupation.

On appeal, counsel argues that the beneficiary is a worker in a religious health care facility, and thus literally qualifies by definition.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The sole issue raised by the director is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following definition:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation at 8 C.F.R. § 204.5(m)(2) states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

Sister Catherine Fraine, religious superior and administrator of the petitioning home, states that the beneficiary "is currently and will continue to be employed in a religious occupation caring for the elderly poor as a nursing assistant. . . . She has been employed with us . . . in a religious occupation for the last two years."

In a cover letter accompanying the petition, counsel states "I would like to clarify that in Sister Catherine's letter, she refers to [the beneficiary]'s work as a 'religious occupation' various times in the letter. In fact, [the beneficiary] **is applying under the rubric of 'other religious worker.'** Both her qualifications and experience point to this type of work" (emphasis in original). Counsel seems, here, to be saying that, notwithstanding the petitioner's use of the term "religious occupation," the beneficiary actually seeks classification as an "other religious worker." There is, however, no "other religious worker" classification. The regulation at 8 C.F.R. § 204.5(m)(2) defines the available classifications as "minister," "religious vocation," and "religious occupation"; the latter two classifications may or may not involve work in a "professional capacity," requiring a bachelor's degree. These classifications derive directly from the wording of the statute. The statute mentions "other work" at section 101(a)(27)(C)(iii) of the Act, but only in reference to work that is neither a "vocation" nor "professional work."

The petitioner's initial submission contained little information about the beneficiary's position, apart from the job title. The director instructed the petitioner to provide additional evidence in order to establish that the position qualifies as a religious occupation. In response, Sister Theresa Robertson, president of the petitioning entity, describes the beneficiary's work:

[The beneficiary] has worked with the residents in the following areas: She has taken care of their personal needs (feeding them; helping them to ambulate; assisting them in organizing their personal belongings). In addition, she prays with the residents both individually and in communal settings. . . . In addition, she volunteers performing other religious duties with the residents and participates in certain religious activities (prayer, social activities) with the Little Sisters of the Poor.

Elsewhere, Sr. Robertson refers to the beneficiary as a "non-religious employee." The petitioner submits a list of "salaried non-religious employees." Counsel acknowledges that the beneficiary's name appears on this list, but states "she is the only lay person living in the Home with the Sisters and the residents." Counsel does not explain the relevance of the beneficiary's living arrangements.

When the petitioner refers to the beneficiary as a "non-religious employee," the petitioner may be using the term "religious" as a noun, defined in *Webster's Ninth New Collegiate Dictionary* as "a member of a religious order under monastic vows." We note that a pamphlet in the record refers to Little Sisters of the Poor as an "international Congregation of women religious." Because the beneficiary is a paid employee, rather than a "religious" bound by a vow of poverty, in that sense she is a "non-religious" employee. This, by itself, does not establish the beneficiary's eligibility, but it demonstrates that the use of the term "non-religious employee" is not inherently disqualifying in this context.

The director denied the petition, stating "the evidence does not establish that the [beneficiary's] duties are traditional religious functions above those performed routinely by lay members of the congregation or religious community. . . . It also does not appear that this position is defined and recognized by the governing body of the denomination as being a bona fide religious occupation, profession, or vocation."

Several of counsel's arguments on appeal are of questionable relevance to the grounds for denial. For instance, counsel observes that, ever since her arrival in the United States, the beneficiary has resided at facilities operated by the Little Sisters of the Poor. This, in itself, says nothing about the nature of the beneficiary's work. Counsel also observes that the beneficiary "is certified as a Nursing Assistant." There are also qualified nursing assistants who work in a variety of wholly secular settings, so this credential is not *prima facie* evidence of eligibility.

More on point, counsel observes that "[t]he definition of Religious Occupation in 8 C.F.R. Part 204.5(m)(2) includes **workers in religious hospitals or health care facilities**" (counsel's emphasis). Counsel asserts that the director "does not dispute that petitioner is a religious health care facility nor is it disputed that the proposed beneficiary of the petition is a worker in a religious health care facility."

Counsel argues that the director failed to consider the totality of the evidence, including substantial documentation of the petitioner's religious purpose. When one takes this evidence into account, counsel contends, "it is clear that the beneficiary's religious work and living circumstances indicate a series of choices which come close to that of a vowed member of a Catholic religious congregation." Whether the beneficiary's residence at the facility, living among religious sisters, puts her in a situation "close to that of a vowed member" is subject to argument, but the regulatory provisions for religious sisters in a religious vocation apply only to individuals who are full, sworn members; those same regulations do not apply, in a limited sense, to aliens who are "close." The beneficiary is not a minister, nor does she engage in a religious vocation, and therefore she cannot qualify for special immigrant religious worker status unless she qualifies as a worker in a religious occupation.

The petitioner submits an affidavit from Most Reverend [REDACTED] the Bishop of Providence, Rhode Island, who states "[p]roviding health care has been and continues to be an integral part of the mission of the Roman Catholic Church throughout the world. As such, provision of health care in Catholic health care facilities is a traditional religious function and flows out of the mission of the church." Bishop Mulvee asserts that workers such as the beneficiary "are an integral part of the religious mission of these institutions and, as such, are religious workers." He adds that the workers receive special religious training beyond anything strictly related to health care.

Each petition must be decided on its own merits. In this particular instance, while we understand the director's misgivings, we find that the record does not support the director's sole articulated ground for denial. The beneficiary's duties are not like those of, for instance, a part-time church pianist or Sunday

school teacher, routinely occupied by volunteers from a church congregation. The petitioner, here, is not a "church" and thus it has no "congregation" to speak of.

The petitioning entity appears to qualify as a religious health care facility, and thus the beneficiary, as a worker in such a facility, would appear at first glance readily to qualify as a "worker in a religious health care facility," an occupation listed at 8 C.F.R. § 204.5(m)(2) as an example of a qualifying religious occupation. There remains, however, a critical question, which the director has heretofore not asked. This question concerns the petitioner's hiring practices for nursing assistants such as the beneficiary.

The Roman Catholic Church would, obviously, not engage the services of a priest who was not a member of the Roman Catholic faith. The same logic applies to individuals who are not only employed by the church, but also performing traditional religious functions of that church. If the petitioning facility employs, has employed, or is willing to employ nursing assistants of different faiths, then the position is primarily a secular one. If an individual does not *have* to be Catholic to qualify for the position, then the fact that this particular beneficiary happens to be Catholic would not establish eligibility, and neither would the general assertion that the nursing assistant staff is held to a particular code of conduct that derives from Catholic doctrine. If the petitioner were to hire, say, a Muslim, a Presbyterian, and a Roman Catholic to fill identical positions, then it would be impermissibly arbitrary to find that the Roman Catholic qualifies for immigration benefits that are unavailable to the others. In such a situation, the religious character of the employer notwithstanding, the position is fundamentally secular, and immigration benefits should be sought through the labor certification process and a Form I-140 petition seeking the immigrant classification that is appropriate to the job requirements.

The director, therefore, must endeavor to ascertain the *complete* requirements for the position that the beneficiary holds. One type of evidence that may be of particular value would be old job announcements (predating this present decision) demonstrating that the petitioner only hires Roman Catholics as nursing assistants. This would serve to demonstrate that the beneficiary's duties are integral to the faith, rather than a predominantly secular function. The petitioner need not demonstrate such a requirement for all of its employees, but rather for the particular type of position that the beneficiary occupies. The presence of non-Catholic custodial staff, for instance, would not be disqualifying, but the (even hypothetical) presence of Jewish nursing assistants would demonstrate that there is nothing intrinsically Roman Catholic about the work of a nursing assistant.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.